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For The Northern Mariana Islands
By _____
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9 UNITED STATES DISTRICT COURT
10 NORTHERN MARIANA ISLANDS

11 UNITED STATES OF AMERICA,)	Criminal Case No. <u>04-00009</u>
)	
12 Plaintiff,)	Sentencing Hearing
)	Date: September 20, 2005
13 v.)	Time: 9:00 a.m.
)	Judge: Hon. Alex R. Munson
14 PEDRO Q. BABAUTA,)	
a/k/a "Pete,")	GOVERNMENT'S MOTION FOR
)	ADDITIONAL SENTENCING
15)	ENHANCEMENT AND UPWARD
16 Defendant.)	DEPARTURE
)	
17 _____)	

18 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
19 Leonardo M. Rapadas, United States Attorney, and Timothy E. Moran, Assistant United States Attorney,
20 and hereby moves for an additional sentencing enhancement to the Advisory Sentencing Guidelines
21 calculation and for an upward departure from that Advisory Guidelines level in the sentencing of the
22 defendant, Pedro Q. Babauta.

23 I. GUIDELINES INCREASES ARE APPROPRIATE FOR DEFENDANT'S USE OF A SPECIAL
24 SKILL AND TO REFLECT THE TRUE SERIOUSNESS AND HARM OF HIS CRIMES.

25 Pursuant to Booker v. United States, – U.S. –, 127 S.Ct. 738 (2005), the Sentencing Guidelines
are advisory and not binding on the Court. However, Booker also directs the Court to perform a

1 traditional Sentencing Guidelines analysis to guide the exercise of its discretion in sentencing. Id. at
2 764. In addition, because the Guidelines are not binding on the Court, the Government does not need to
3 prove enhancements beyond a reasonable doubt to the jury. Id. The Court may find enhancements on
4 the basis of the evidence heard during trial, submitted by the Probation Office, or during the course of
5 the sentencing hearing.

6 The United States Probation Department has already prepared a Presentence Investigation Report
7 (PSR) including a Guidelines calculation: a base level of 6 under U.S.S.G. § 2B1.1, plus two-level
8 enhancements for the defendant's role in the offense, § 3B1.1(c); abuse of public trust, § 3B1.3; and for
9 obstruction of justice, § 3C1.1. The Government requests that the Court apply enhancements for use of
10 a special skill and because the amount of loss does not accurately reflect the seriousness of the
11 defendant's crimes.

12 A. A Two Level Enhancement Is Appropriate For Defendant's Use Of A Special Skill.

13 United States Sentencing Guideline § 3B1.3 provides for a two-level enhancement for use of a
14 special skill, namely the defendant's scientific knowledge that enabled him to falsify data. Comment 3
15 to § 3B1.3 defines "special skill" as a "skill not possessed by members of the general public and usually
16 requiring substantial education, training or licensing. Examples would include pilots, lawyers,
17 accountants, *chemists*, and demolition experts." (emphasis added) The defendant has a specialized
18 scientific background, including a bachelor's degree in zoology and three years of additional higher
19 education in environmental health. He also spent over twelve years at the CUC Laboratory, much of that
20 time as laboratory manager. He received additional training at the CUC Laboratory. The Laboratory
21 itself was licensed during the defendant's tenure as manager by DEQ to perform those tests. Defendant
22 himself performed and oversaw the chemical testing and analysis of water samples, including testing for
23 bacteria. He used those skills in falsifying the test reports that were submitted to DEQ.

24 United States v. White involved convictions under 18 U.S.C. § 1001 for false statements
25 contained in water turbidity reports submitted under the Safe Drinking Water Act within the jurisdiction

1 of the EPA.¹ 270 F.3d 356 (6th Cir. 2001). The Court of Appeals affirmed an enhancement for use of a
 2 special skill, finding that the defendant's "training and experience in water treatment plant operation
 3 made it significantly easier for her to falsify turbidity readings and to conceal the falsifications from the
 4 regulators." Id. at 373. The Court of Appeals discounted the fact that entering the actual numbers takes
 5 no particular skill because of the skill required to understand, manipulate and ultimately conceal the
 6 data. Id. at 373-74. In addition, the Court affirmed the application of enhancements under § 3B1.3 for
 7 both abuse of trust and use of a special skill in the same case.

8 B. An Upward Departure Is Necessary To Reflect The True Seriousness and Harm Of The
 9 Defendant's Crimes.

10 The defendant's convictions for false statements fall under U.S.S.G. § 2B1.1, which generally
 11 applies to property offenses and includes fraud. This section evaluates the seriousness of the crime by
 12 the amount of economic loss. See § 2B1.1, cmt. 3. Because the defendant committed this fraud without
 13 any monetary gain, the Guidelines' focus on monetary loss minimizes the seriousness of the crime.
 14 Accordingly, the Court may depart upward. See Id. at cmt., (n. 19) ("There may be cases in which the
 15 offense level determined under this guideline substantially understates the seriousness of the offense.");
 16 United States v. Barnes, 125 F.3d 1287, 1291 (9th Cir. 1997); United States v. Coon, 187 F.3d 888, 900
 17 (8th Cir. 1999) (affirming upward departure under this application note).²

18 The defendant committed this fraud to protect the reputation of CUC and by extension his wife,
 19 the CUC Executive Director, his cousin, the CUC Water Division manager, and himself. This non-
 20 monetary objective falls squarely among the non-exhaustive list of factors for the Court to consider in
 21 determining whether to depart upward. U.S.S.G. § 2B1.1, cmt., (n. 19(A)(i)) ("A primary objective of

22 ¹Turbidity is another required test under the SDWA and is listed on the "raw data sheets"
 23 submitted in evidence in the trial, e.g., Government's Exhibit ("GX") 2.

24 ²Barnes and the other cases cited applied U.S.S.G. § 2F1.1 for fraud and notes thereto. Pursuant
 25 to the 2001 amendments to the Sentencing Guidelines, §2F was combined with § 2B for a single fraud
 section, and the relevant Application Notes were incorporated into the Commentary to § 2B. Under the
 2004 version of the Guidelines, the applicable note is 19.

1 the offense was an aggravating, non-monetary objective.”); see also United States v. Andersen, 45 F.3d
2 217, 222 (7th Cir. 1995).

3 In addition, the defendant’s harm is not reflected in economic terms, another factor for the
4 Court’s consideration. § 2B1.1, cmt., (n. 19(A)(ii)) (“The offense caused or risked substantial non-
5 monetary harm.”); see also United States v. Fadayini, 28 F.3d 1236, 1242 (D.C. Cir. 1994) (affirming
6 upward departure under this application note “based on the intangible effect that appellants’ fraud had on
7 their victim”); Andersen, 45 F.3d at 222 (remanded for resentencing to consider upward departure where
8 “upward departure may certainly be warranted by the non-monetizable risk to human and animal health
9 caused by the defendants’ failure to follow FDA licensing regulations”). The defendant, for his own
10 gain, subjected the people of Saipan to bacteria infested water. Such bacteria can cause serious illness.
11 In addition, he eroded public confidence in the water supply of Saipan. These harms are not insubstantial
12 and are not reflected by the base level of 6.

13 Because the defendant acted with a non-monetary objective and his harm cannot be measured in
14 economic terms, the Court should depart upward to reflect the seriousness and harm of the defendant’s
15 crime. Where the entire public’s health was put at risk, it is hard to underestimate the seriousness of
16 these crimes. Accordingly, the Court should depart upward and increase the base offense level under §
17 2B1.1 by **six levels**.

18 C. The Enhancements Already In the PSR Are Appropriate.

19 The enhancements already determined by the Probation Department are appropriate. First, a two-
20 level enhancement is appropriate for the defendant’s role in managing others, specifically Mariano
21 Iglecias. Iglecias testified that he prepared false reports at the defendant’s request. In addition, also at
22 the defendant’s instruction, Iglecias signed and released the February, 2003 monthly report (GX 1), the
23 document at issue in Count Five of the Indictment.

24 Second, a two-level enhancement is appropriate under § 3C1.1 for obstructing justice. Iglecias
25 testified that the defendant asked him to destroy the underlying data to hide his false statements and

1 requested that he lie about the fraud before Iglecias was to meet with the CUC Board of Directors. The
2 fact that this latter request concerned an official investigation, and not specifically an instruction
3 regarding court testimony, does not make a difference. See U.S.S.G. § 3C1.1, cmt., (n. 4) (“adjustment
4 also applies to any other obstructive conduct in respect to the official investigation”). In addition, the
5 defendant himself lied to and attempted to mislead the investigation performed by DEQ, prior to the
6 filing of the indictment. This conduct also qualifies for the enhancement. See id. at cmt., (n. 4(c))
7 (“producing or attempting to produce a false, altered, or counterfeit document or record during an
8 official investigation”).

9 Finally, the defendant is also not entitled to a two level reduction under § 3E1.1 for acceptance of
10 responsibility. Application Note 2 clearly indicates that this reduction is not intended for a defendant
11 that puts the government to its burden of proof at trial. The “rare situations” that warrant this reduction
12 after trial are determined “primarily upon pretrial statements and conduct.” U.S.S.G. § 3E1.1, cmt., (n.
13 2). The defendant showed no acceptance of responsibility before trial, such as by his attempts to cover
14 up his scheme. This behavior is inconsistent with acceptance of responsibility. See United States v.
15 Rutledge, 28 F.3d 998, 1001 (9th Cir. 1994); United States v. Chastain, 84 F.3d 321, 324 (9th Cir. 1996).

16 II. THIS COURT SHOULD IMPOSE THE MAXIMUM SENTENCE UNDER THE STATUTE.

17 The total offense level in the PSR, combined with the enhancements requested by the
18 Government, add up to level 20, which provides for a sentence of 33-41 months. The maximum penalty
19 for a conviction under 18 U.S.C. § 1001 is five years’ imprisonment. Under Booker, the Court may give
20 a sentence in excess of the Guidelines calculation so long as it is not more than the statutory maximum.
21 Booker, 125 S.Ct. at 764. Because of the defendant’s callous indifference to the health of the people of
22 Saipan and his brazen willingness to place his own interests, and those of his wife, over the people that
23 he was supposed to protect, the Government requests that the Court impose a term of imprisonment of
24 five years under each count, to run concurrently.

1 There was ample testimony at trial concerning the grave risk to the public health posed by the
2 presence of bacteria in the public water supply. For example, CUC was required to warn the people of
3 Saipan in the case of a confirmed hit for *E coli* that

4 *Fecal coliforms and E. Coli are bacteria whose presence indicates that the water may be*
5 *contaminated with human or animal wastes. Microbes in these wastes can cause diarrhea,*
6 *cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants,*
7 *young children, some of the elderly, and people with severely compromised immune systems.*

8 (Government Exhibit 35.) The defendant's false statements included the falsification of hits for *E. Coli*
9 and fecal coliforms. The defendant thus put the health and safety of the people of Saipan at risk. There
10 is no way to know how many people might have been injured because the symptoms of these infections
11 correspond directly with many other common illnesses, including colds, flu and food poisoning.
12 However, it is clear that the defendant in suppressing this information acted with supreme indifference to
13 the health of the people of Saipan.

14 The public health cannot be measured in monetary terms. As discussed above, the Guidelines for
15 this crime do not accurately measure the harm of the defendant's crime. The sentence imposed needs "to
16 reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment
17 for the offense." 18 U.S.C. § 3553(a)(2)(A). Accordingly, the Government requests that the Court
18 impose the maximum sentence for each offense, five years' imprisonment, to run concurrently.

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20 United States Attorney
Districts of Guam and the NMI

21 Date: September 9, 2005

22 By:

23 
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